

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2007-0022

CORRECTED AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY BROOKS IMPERIAL REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY ELBERT
COUNTY DEVELOPMENT COUNCIL, INC.**

On November 8, 2007, Complainant Brooks Imperial ("Imperial") filed a complaint with the Colorado Secretary of State against Elbert County Development Council, Inc. ("ECDC"), alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2007) ("the FCPA"), specifically, Section 1-45-117. The Secretary of State transmitted the complaint to the Colorado Office of Administrative Courts on November 9, 2007, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter January 14, 2008. The hearing was digitally recorded in Courtroom 2. Imperial participated personally and represented himself. ECDC was represented by Charles Groesbeek, Director and officer, pursuant to Section 13-1-127(2), C.R.S. (2007) (under specified circumstances a closely held entity may be represented by an officer). The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Colo. Const., Art. XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2007).

ISSUE PRESENTED

The issue to be determined is whether the ECDC violated Section 1-45-117 of the FCPA by expending public funds or making contributions to urge voters to vote in favor of referred issue 1B on the November 2007 ballot in Elbert County, Colorado. Ballot issue IB was a referred measure creating a 1% sales and use tax, the proceeds of which were intended for maintenance, paving, and building of roads and bridges in Elbert County. Imperial contends that in October 2007, ECDC, acting in a governmental capacity and through its Director, contributed \$100 to the Elbert County Transportation Initiative, an issue committee organized to support issue IB. ECDC asserts that it is not a covered entity under Section 1-45-117. It also asserts that the contribution or expenditure in question was actually made by Groesbeek individually using his personal funds and was not, in fact, a contribution from or expenditure of ECDC.

FINDINGS OF FACT

1. Imperial is a resident of the town of Elbert County, Colorado.

2. The Elbert County Development Council, Inc. was formed and incorporated in Colorado in June 2001 as a nonprofit corporation. As provided by Article III of ECDC's Articles of Incorporation, it "is organized and shall be operated exclusively to encourage and promote balanced economic growth and community development within the meaning of § 501(c)(6) of the Internal Revenue Code of 1986."¹ Charles Groesbeek has been Director of ECDC since its formation in 2001.

3. John Melti is Chairman of the Elbert County Board of County Commissioners (ECBOCC). His wife, Sherry Melti, is registered agent for ECDC and is a member of ECDC.

4. Prior to 2001, other organizations have existed that used the name "Elbert Council Economic Development Council." These organizations were no longer in existence at the time ECDC was incorporated. The evidence did not establish there is a direct organizational or other relationship or link between these prior entities and the current ECDC.

5. In 1993, an individual named Frank Starkey was a director of a prior organization named "Elbert Council Economic Development Council." At some point in the past not disclosed by the record, Frank Starkey was a member of the ECBOCC. The record did not disclose how long Frank Starkey was a director of this previous entity or whether Frank Starkey's positions on the ECBOCC and as a director of the previous entity overlapped at any time.

6. In 2001, ECDC received \$60,000 in economic development monies from a fund previously established by the Union Pacific Railroad and administered by the ECBOCC. The monies were disbursed by the ECBOCC to ECDC. ECDC used the funds to hire a consultant who conducted an economic opportunity assessment regarding the potential for establishing industry in eastern Elbert County. The monies were fully spent in 2001. There is no evidence that ECDC has received any funds from ECBOCC since 2001 or has otherwise received public monies from any source.

7. Subsequent to receiving \$60,000 in economic development funds from the ECBOCC, ECDC has had the following contacts with the ECBOCC:

a. In March 2004, ECDC representatives Van Sands and Charles Groesbeek requested that the ECBOCC adopt a resolution supporting a bio-agricultural complex on the I-70 corridor. ECBOCC unanimously adopted a motion recognizing that the county

¹ 26 U.S.C. § 501(c)(6) provides a tax exemption for business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues.

desires commercial and industrial growth that will promote economic diversity, supporting ECDC in its efforts to bring industry to Elbert County that is compatible with the agricultural resources and rural character of the County, and encouraging ECDC to work with North American Bio-Energy Resources in an effort to create a bio-refinery project in Elbert County.

b. In April 2004, Van Sands of ECDC requested that the ECBOCC send a letter to the Colorado Department of Local Affairs requesting \$150,000 in assistance for ECDC with respect to the bio-agricultural project. The resolution did not require the expenditure of County funds. ECBOCC unanimously voted to do so.

c. In August 2004, Van Sands and Charles Groesbeek, on behalf of ECDC, complained to the ECBOCC concerning what they considered to be a lack of competence and anti-growth sentiment in the County's planning department. They requested that the ECBOCC pass a resolution taking remedial measures and requiring County workers to refer all inquiries regarding economic development and commercial activity to ECDC within two days. The ECBOCC did not adopt the resolution proposed by ECDC but did agree that applicants would be provided with ECDC contact information so that they could contact ECDC independently if they wished to do so.

d. In September 2004, ECDC requested permission of ECBOCC to use the County logo on ECDC's stationery. ECBOCC denied this request.

e. In October 2004, Charles Groesbeek, on behalf of ECDC, provided ECBOCC with an update concerning a meeting with the Lincoln County Director of Economic Development and the McGalpin Group, relating to a proposed wind farm for Lincoln County. Groesbeek also reported on a meeting with an attorney regarding a proposed bio-agricultural foundation.

f. In December 2004, Charles Groesbeek, on behalf of ECDC, provided ECBOCC with an update concerning the wind project. He also spoke to the ECBOCC on behalf of an independent businessman new to the area who was having difficulties with zoning issues. ECBOCC took no action concerning the zoning matter but indicated the matter would be discussed with the County Attorney.

g. On July 25, 2007, Tim Sheridan, employed by the Elbert County Road and Bridge Department, and Charles Groesbeek requested the ECBOCC adopt a resolution to place a use tax and a sales tax of 1% on the county ballot for the November 2007 election, with the proceeds to go to the Road and Bridge Fund for maintenance of roads, paving, and building new roads. The ECBOCC unanimously passed a resolution to refer such a measure to the voters of Elbert County.

8. Ballot issue 1B, a proposal creating a 1% sales and use tax, the proceeds of which were intended for maintenance, paving, and building of roads and bridges in Elbert County, was referred to the voters of Elbert County by the ECBOCC for

determination in the November 2007 election. The measure was ultimately successful, with approximately 2,904 votes in favor and 2,694 votes opposed, a margin of approximately 210 votes.

9. The Elbert County Transportation Initiative (ECTI) was an issue committee formed to support ballot issue 1B. ECTI mailed flyers to Elbert County residents in support of the ballot measure. It also paid for advertisements supporting the ballot proposal that appeared at least four times (twice in each of two newspapers) between October 25, 2007 and November 1, 2007. The flyers and the advertisements urged voters to vote in favor of ballot issue 1B.

10. Charles Groesbeek was a member of ECTI. On October 22, 2007, Groesbeek received a telephone call from Lori Kelly, ECTI Treasurer, who informed him she believed she had inadvertently overdrawn ECTI's checking account. Groesbeek told her he would add \$100 to ECTI's account to cover any of ECTI's outstanding obligations. Groesbeek then went to Bank of Choice in Elizabeth, Colorado, where he took \$100 in cash from his own pocket and deposited that sum in ECTI's account. However, rather than signing his name personally to the deposit slip, he signed "Charles for ELCO Development Council" (a reference to ECDC). Groesbeek's persuasive explanation at hearing of this action was that his wife was unhappy with his personal involvement in political causes. Thus, after starting write his own name on the deposit slip, Groesbeek changed his mind and indicated the contribution (or expenditure) was from ECDC. In fact, the sum was from Groesbeek's personal funds.

11. Consistent with the October 22, 2007 deposition slip, ECTI subsequently filed a Report of Contributions and Expenditures with the Colorado Secretary of State in which it reported a \$100 contribution from ECDC on October 22, 2007. There is no indication in the record that at the time this report was filed ECTI had any information that the \$100 sum did not come from ECDC funds.

12. The evidence did not establish that ECDC was organized by ECBOCC.

13. ECDC is not an entity of government organized or created by statute.

14. ECDC is not an agency, department, board, division, bureau, commission, or council of the state, is not a political subdivision of the state, and is not any other unit of government. ECDC is not under the control of any governmental entity is not able to control any government agency.

15. The record failed to establish ECDC is anything other than an organization of private of citizens grouped together by common interests and attempting to influence government through appropriate methods.

16. The evidence did not establish any funds of ECDC were actually contributed to ECTI.

17. The evidence failed to establish that ECDC had or expended any public funds from any source in October 2007.

DISCUSSION

Article XXVIII of the Colorado Constitution, adopted as an initiated measure by the voters of Colorado in 2002, in combination with the FCPA, together comprise Colorado's campaign finance law. Imperial contends the ECDC violated these provisions as they relate to expenditures or contributions by public entities. Specifically, Imperial maintains the October 22, 2007 \$100 contribution to, or expenditure on behalf of, ECTI reported as coming from ECDC constituted an improper expenditure or contribution by ECDC in support of ballot issue IB, in violation of Section 1-45-117 of the FCPA.

In accordance with Section 9(1)(f) and 9(2)(a) of Article XXVIII of the Colorado Constitution, this proceeding is conducted pursuant to the provisions of Section 24-4-105, C.R.S. of the State Administrative Procedure Act ("APA"). In such a proceeding, the proponent of the order bears the burden of proof. Section 24-4-105(7), C.R.S. In this case, Imperial is the complaining party and therefore bears the burden of proof to establish a violation of Colorado's campaign finance law, as alleged in his complaint. It is clear (and undisputed) that the \$100 contribution or expenditure did constitute support for ballot issue IB. However, because the ALJ concludes Imperial has failed to establish ECDC was a covered entity under the FCPA, had public monies in 2007 at the time of the contribution or expenditure, or made any contribution or expenditure in support of ballot issue IB, the ALJ determines no violation of Section 1-45-117 of the FCPA has been proved.

1. *No Showing ECDC Is A Covered Entity.* Section 1-45-117(1)(a)(I) prohibits any "agency, department, board, division, bureau, commission, or council of the state" or any "political subdivision" of the state from "expend[ing] any public moneys from any source, or mak[ing] any contributions to urge electors to vote in favor or against" specified matters, including certain local ballot issues and referred measures.²

² Specifically, Section 1-45-117(1)(a)(I) provides:

No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any:

(A) State-wide ballot issue that has been submitted for the purpose of having a title designated and fixed pursuant to section 1-40-106 (1) or that has had a title designated and fixed pursuant to that section;

There is no dispute in this case that the ballot issue in question was a covered election.³

Imperial contends the ECDC violated this section by making a \$100 contribution to, or expenditure on behalf of, ECTI, an issue committee supporting ballot issue IB. Although the evidence is undisputed that ECTI was organized for the purpose of supporting ballot issue IB and did, in fact, urge voters through direct mail and newspaper advertisements to vote in favor of the ballot measure, Imperial has failed to establish that ECDC, even if it had made the contribution or expenditure in question, was a covered entity to which the prohibitions of Section 1-45-117 would apply. Specifically, Imperial has failed to show that ECDC is an agency, department, board, division, bureau, commission, or council of the state or any political subdivision of the state.

Imperial asserts ECDC acted as a “government council” and is therefore subject to the prohibitions of Section 1-45-117. In support of this assertion, Imperial argues that in 2001 ECDC received a significant sum of money from ECBOCC, that prior members of the ECBOCC have also been associated with ECDC, and that currently the wife of an ECBOCC County Commissioner is a member of ECDC. Imperial also argues that by engaging in economic development activities at the request of, or with the agreement of, ECBOCC, ECDC has participated in “government activity.” He contends that a reasonable inference can be drawn that ECDC was established by or at the request of ECBOCC and he points to ECDC’s many appearances before the ECBOCC as indicating ECDC’s ability to control the actions of ECBOCC and ECDC’s ongoing participation in the business of government. Imperial thus appears to be arguing that ECDC is effectively functioning as an extension of the ECBOCC such that its actions should be governed by Section 1-45-117.

Imperial’s arguments are unconvincing both legally and factually. As noted in *Coffman v. Common Cause*, 102 P.3d 999, 1007 (Colo. 2004), in connection with its public spending limitations, the FCPA “regulates expenditure of public monies by state agencies, departments, officials and employees to prevent the state machinery from thwarting the electoral process.” The underlying purpose of these provisions is to assure that inappropriate government power is not brought to bear to interfere in

(B) Local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section;

(C) Referred measure, as defined in section 1-1-104 (34.5);

(D) Measure for the recall of any officer that has been certified by the appropriate election official for submission to the electors for their approval or rejection.

³ Although at hearing the parties appeared to concede this matter was covered as a local ballot issue pursuant to Section 1-45-117(1)(a)(I)(B), it appears that in fact the election is covered by Section 1-45-117(1)(a)(I)(C), concerning referred measures.

elections. See, *Mountain States Legal Foundation v. Denver School District #1*, 459 F. Supp. 357, 360 (D. Colo. 1978) (citing a California Supreme Court opinion which emphasized a “uniform judicial reluctance to sanction the use of public funds for election campaigns,” based on an “implicit recognition” that such expenditures “raise potentially serious constitutional questions.”) (decided under a prior version of the FCPA).

Because the purpose of Section 1-45-117 is to avoid governmental coercion in the elections process, *Coffman* at 1009, Section 1-45-117 addresses its contribution and expenditure limitations to governmental entities, not private organizations. In this case, Imperial has failed to establish the asserted source of the contribution or expenditure in question, ECDC, is among the types of entities covered by the Act. First, although Imperial asserts ECDC was acting as a government “council,” he has makes no argument that ECDC acted in any manner as a *state* government entity. Therefore, it cannot be asserted that ECDC is “an agency, department, board, division, bureau, commission, or council of *the state*” (emphasis supplied).

The only remaining category of prohibited entities in Section 1-45-117 is “political subdivisions” of the state. As determined by the Colorado Supreme Court in *Davidson v. Sandstrom*, 83 P.3d 648 (Colo. 2004), a political subdivision may be defined as either “[a] division of the state . . . for purposes of carrying out a portion of those functions of a state which by long usage and inherent necessities of government have always been regarded as public,” quoting *Black’s Law Dictionary* 1159 (6th ed. 1991), or “[a] division of the state that exists primarily to discharge some function of local government,” quoting *Black’s Law Dictionary* 1179 (7th ed. 1999).

The evidence here simply failed to establish ECDC falls within either of these definitions. ECDC has no statutory basis as a governmental entity and was not created at the behest of a governmental entity. It thus cannot be considered a “division of the state,” as required by both definitions of political subdivision approved by the Supreme Court. Moreover, the record failed to establish that ECDC is organized to carry out a function that have been traditionally considered public or a function of local government, as also required by those definitions. ECDC is organized to encourage and promote economic activity; there is no evidence that such activity has been traditionally or exclusively regarded as a government function, as opposed to a private, entrepreneurial function. The record also failed to establish either that ECDC is subject to the control of ECBOCC or *vice versa*. Instead, the evidence indicated that both entities are independent, that ECDC sometimes takes actions suggested by ECBOCC and sometimes does not, and that ECBOCC sometimes accedes to ECDC’s requests and sometimes does not.

The record failed to establish that ECDC is anything other than a private organization of like-minded individuals who, on various occasions, petition a unit of local government concerning matters of mutual concern to the organization’s membership. Such an organization does not constitute a “council” of either state or local government. Furthermore, the fact that ECDC at one time received economic development funds

from ECBOCC does not transform ECDC into a government council. The language of the Section 1-45-117 of the FCPA is limited to entities that are governmental in nature. The underlying purpose of the contribution and expenditure prohibitions of that section are similarly limited. There is simply no indication in Section 1-45-117 that its spending and contribution prohibitions were intended to be expanded beyond the governmental entities listed therein to cover contributions and expenditures by any private person, organization, or corporation that has previously entered into some type of agreement with such a governmental entity.

Thus, the record does not establish that ECDC is an agency, department, board, division, bureau, commission, or council of the state or any political subdivision of the state or any other unit of government. Furthermore, as a factual matter, the evidence failed to establish that ECDC is the functional equivalent of a unit of government. ECDC is merely a private organization that neither controls nor is under the control of ECBOCC or any other governmental entity. Consequently, ECDC is not a covered entity governed by the contribution and expenditures prohibitions of Section 1-45-117.

2. *ECDC's Alleged Responsibility for the Alleged Violation.* Even assuming, contrary to the ALJ's conclusion, that ECDC were a covered entity under Section 1-45-117, the evidence failed to show the \$100 sum in question was a contribution or expenditure of ECDC funds. Although ECDC reported the sum as a contribution from ECDC (apparently based on Groebeeck's bank deposit slip which identified the source as ECDC), the evidence at hearing established the money actually represented cash from Groebeeck's personal funds and did not come from funds of ECDC. Therefore, the evidence did not establish the required element under Section 1-45-117 that there was a contribution⁴ or expenditure⁵ *by a covered entity*. Additionally, with respect to the

⁴ Contribution is defined at Section 1-45-103(6) of the FCPA and Section 2(5)(a) of Colo. Const., Art. XXVIII as follows:

(I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, small donor committee, or political party;

(II) Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party;

(III) The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, small donor committee or political party;

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

⁵ Expenditure is defined Section 1-45-103(10) of the FCPA and Section 2(8)(a) of Colo. Const., Art. XXVIII to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of . . . supporting or opposing a ballot issue or ballot question."

issue of any potential *expenditure* (as opposed to contribution) by ECDC, the record failed to establish, among other things, that ECDC had any public monies after 2001. Therefore, the evidence did not establish that ECDC could have expended any public monies in 2007 to urge electors to vote in favor of ballot issue 1B (or for any other purpose).

In summary, Imperial has failed to prove the elements necessary establish the ECDC committed a violation of Section 1-45-117, as charged in the complaint.⁶

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter. Colo. Const. Art. XXVIII, §(9)(2)(a).

2. Colo. Const. Art. XXVIII, §(9)(1)(f) provides that the hearing in this matter is to be conducted in accordance with Section 24-4-105 of the APA. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Imperial the proponent of an order seeking a determination that ECDC committed a violation of Section 1-45-117.

3. The evidence failed to show the ECDC committed a violation of Section 1-45-117 of the FCPA.

4. Because no violation of Section 1-45-117 of the FCPA was established, this matter must be dismissed.

AGENCY DECISION

It is the Agency Decision of the ALJ no violation of Section 1-45-117 of the FCPA by the Elbert County Development Council, Inc. was established. Imperial's complaint is therefore dismissed.

This decision is subject to review by the Colorado Court of Appeals pursuant to Section 24-4-106(11), C.R.S. and Colo. Const. Art. XXVIII, §9(2)(a).

DONE AND SIGNED
February ____, 2008

JUDITH F. SCHULMAN
Administrative Law Judge

⁶ The Complaint does not allege violations of any section of the FCPA other than 1-45-117 or violations by entities other than ECDC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **CORRECTED AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

Brooks Imperial
12300 County Road 118
Kiowa, CO 80117

Charles Groesbeek, Director
Elbert County Economic Development Council, Inc.
P.O. Box 432
Kiowa, CO 80117

Charles Groesbeek, Director
Elbert County Economic Development Council, Inc.
Thistledown
2883 County Road 132
Elizabeth, CO 80107

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1700 Broadway, Suite 200
Denver, CO 80290

on this ____ day of _____.

Technician IV